

With respect to food for human consumption which is to be consumed off the premises where it is sold, Retailers' Occupation Tax is imposed at the rate of 1% plus applicable local taxes. See 86 Ill. Adm. Code 130.310. (This is a GIL.)

December 7, 2001

Dear Xxxxx:

This letter is in response to your letter dated August 24, 2001 that we received on September 28, 2001. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be accessed at the Department's Website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

I am writing to ask for a formal determination of the correct tax rate that I should be charging at my business in CITY, Illinois. I had been charging 6 ½% on retail sales until last month. PERSON, a department head in your Audit Division, audited our past 19 months of Sales Tax Returns last month based on a customer complaint. Said customer believed we should only be charging her 1% on retail purchases since our candy was analogous to wholesale candy sold through a grocery store. When we told her that the Illinois Department of Revenue had told us that 6 ½% was the correct rate she apparently felt we were trying to defraud her and you, the State, and pocket the difference between 1% and 6 ½%. At any rate, that brought the Auditor out (at my request).

PERSON told us that our proper rate was 1 ¼%. He finished his audit and instructed me to change to the new rate at the first of July and report at that rate. You will notice that my July return is at 1 ¼%. He also sent us some supporting documents in his last email to me with two sections of the tax code included. After reading the code I am just as confused as I have been in the past. At least a half dozen times over the past 10 years I have called your offices to get a clarification over the phone about what tax rate we should charge as a manufacturer, a retailer, and a mail order purveyor. Until the audit, I had always been told that as a retailer of my own manufactured goods in single serve form I needed to charge 6 ½%. This seems to fit Title 86, Part 130, Section b), Paragraph 6) in which the low rate applies to retailers of prepackaged, single serving foods with no on premises eating facilities as long as the retailer does not "*prepare, in ANY WAY*" the food sold for immediate consumption. As the manufacturer, I was told that we were "preparing" the food.

It is the contention of the patron who notified you about us, the contention of your auditor, PERSON, and I guess, common sense, that would argue differently. The manufacturing end of the business is a separate entity for the purposes of applying this law and since the product we manufacture for our own use doesn't differ at all from the product we make for our wholesale accounts to sell, then our retail end of the business should be treated just as you would treat a [GROCERY] store. It does seem wrong that

the candy bar I make here and sell here would carry a 6 ½% tax rate while the same bar sold through a grocery store carries a 1 ¼% tax rate.

Please advise us definitively, in writing, as to what rate I should be charging and filing in time for me to change my cash registers for September.

Please advise me further as to when a sale is taxable for my mail order sales. PERSON felt that I was a little off there too. Currently we accept mail orders in our store in CITY IL over the counter, over the telephone from everywhere (in state and out), by mail, and over the Internet through our website. Until now we have been charging tax on sales originating from within Illinois regardless of how the order is conveyed to us. The purchaser's address was the only one that mattered. Some examples: An order placed in our store, over the counter was obviously charged tax. An order sent by mail from an Illinois address was charged tax, a phone order from an Illinois resident was charged tax, phone orders from outside the state were not charged tax, mail orders from outside the state were not charged tax, Internet orders were charged tax although I understand that, because of Federal legislation we are not REQUIRED to collect the tax for another year or so. Are these correct interpretations? Thank you very much for your prompt attention. Also, is our low rate 1% or 1 ¼%!

Please refer to the enclosed copy of 86 Ill. Adm. Code 130.310, "Food, Drugs, Medicines and Medical Appliances." This regulation describes how sales of food can be subject to either low (1%) or high (6.25%) rates under the Retailers' Occupation Tax Act. Local sales taxes may also apply, depending upon where retail sales are made. The current regulations no longer use a high/low rate distinction based solely on the size or quantity in which food items are sold. Rather, the appropriate rate of tax for food items sold is determined by the character of the retailers' establishment as well as the nature of the sales.

All sales by retail establishments that provide facilities for on-premises consumption of food are subject to the high rate of tax unless the establishments utilize separate means of collection and physically partition the areas in which food not for immediate consumption is sold. Please refer to 86 Ill. Adm. Code 130.310(b)(2)(A).

If businesses do not provide facilities for on-site consumption, they must charge the high rate on all food sales if a majority of their gross receipts from food sales is for items sold in a state of preparation for immediate consumption (prepared by the retailer so as to be eaten without substantial delay after the final act of preparation) and would charge the low rate on all food sales (except for hot foods, foods prepared by the retailer for immediate consumption, soft drinks and alcoholic beverages) if a majority of their gross receipts from food sales is for items sold in bulk.

Food prepared for immediate consumption means food made ready by the retailer to be eaten without substantial delay after the final act of preparation by the retailer. It is presumed that retailers who sell food prepared for immediate consumption in individual single-sized servings will sell all such items for consumption without substantive delay. Thus, for example, a retailer whose gross sales receipts are derived primarily from sales of individual fudge pieces, soft pretzels, doughnuts, or cookies prepared in the morning will be subject to the high rate of tax regardless of when during a business day such items are sold and actually consumed. The high rate is applicable to all his sales in this instance, including items sold in bulk. See 86 Ill. Adm. Code 130.310(b)(6). However, a candy retailer whose gross receipts reflect that a majority of items sold are in bulk, such as boxes of candy, should charge the low rate for such sales. The current rate of tax for CITY, Illinois for sales of general

merchandise and food that does not qualify for the low rate is 6.5%. The rate for food whose sales qualify for the low rate is 1.25%.

You also inquired about phone and mail order sales. Please be advised you should charge Illinois and local Retailers' Occupation Tax for phone and mail order sales where your product is sent to an Illinois address. You should charge the sales tax rate for your location, because that is where you are accepting the purchase order. For phone and mail order sales where your product is sent to an out-of-State address, you are not required to collect Illinois sales tax where the transaction meets the conditions set out in 86 Ill. Adm. Code 130.605(c). This regulation states that Retailers' Occupation Tax does not apply where sellers ship goods by carrier or by mail, according to the terms of agreements with purchasers, and the seller delivers the goods from a point within Illinois to a point outside Illinois and the goods are not to be returned to Illinois. Such sales are considered to be sales in interstate commerce and are exempt from Illinois and local Retailers' Occupation Tax, although there may be a tax liability in the other state involved in the transaction. However, sales are not deemed to be in interstate commerce if the purchaser or his representative receives the physical possession of the property in Illinois, even if such property is immediately transported outside of Illinois, 86 Ill. Adm. Code 130.305(a)(1) and (2).

Please be informed that for Internet sales you should apply the above stated principles and you should charge Illinois and local Retailers' Occupation Tax for Internet sales where your product is sent to an Illinois address. Only out-of-State deliveries that meet the conditions of Section 130.605(c) are exempt from Illinois tax by virtue of the interstate commerce exemption. The federal legislation on Internet taxation does not affect existing sales and use tax liabilities on sales of tangible personal property made through the Internet.

I hope this information is helpful. The Department of Revenue maintains a Website, which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Karl W. Betz  
Associate Counsel

KWB:msk  
Enc.